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DEEPENING THE ANOMALY OF SOVEREIGN IMMUNITY: *PENNHURST* *STATE SCHOOL AND HOSPITAL v.* *HALDERMAN*

The doctrine of sovereign immunity, which originated at early English common law, embodies the principle that a sovereign cannot be sued without its consent.¹ This principle underlies the eleventh amendment to the United States Constitution, which is construed to immunize states from suits brought in federal court.²

¹ THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS* 1 (rev. ed. 1976) [hereinafter cited as *THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS*]. At English common law, it was settled by the thirteenth century that, absent the king's consent, the king could not be sued in his own courts. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963); Martin, *The New Interpretation of Sovereign Immunity for the States*, 16 CAL. W.L. REV. 39, 40 (1980). However, sovereign immunity did not leave those subjects with claims against the crown without any remedy. Jaffe, *supra* at 1. By using certain procedural devices, the potential hardship of sovereign immunity was avoided and subjects were allowed to obtain relief from the king and government officials. *Id.* at 3-8. Indeed, courts habitually granted "petitions of right," *id.* at 5, or allowed suits for damages against government officials, *id.* at 9. Moreover, subjects could sue without the king's consent in cases involving real property. *Id.* at 6 n.10. Thus, it is generally accepted that the king enjoyed only a nominal immunity under common law that did not reflect the actual accountability of the government to its subjects. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895 (1983); see also C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 6 (1972) ("The immunity doctrine . . . was largely a legal conception, which determined the forms of procedure in some cases but did not seriously impair the subject's right to recovery in accordance with substantive law"); Jaffe, *supra*, at 1 ("When it was necessary to sue the Crown *eo Nomine* consent apparently was given as of course").

Prior to the American Revolution, colonial subjects were afforded the same procedural remedies against government officials as their English counterparts. See Jaffe, *supra*, at 19. In addition, colonists relied upon their right to sue local government entities. Gibbons, *supra*, at 1896. Indeed, the colonial charters of Massachusetts, Connecticut, and Rhode Island expressly authorized suits against the governor and the colonial governments, *id.*, and the Virginia Corporations, although acting as sovereign over its colonial inhabitants, "was no less suable than corporations generally," *id.* at 1897. Similarly, the governments of New York, Maryland, and Pennsylvania were founded on proprietary grants to individuals "who at common law enjoyed no immunity from suit." *Id.*

² U.S. CONST. amend XI. The eleventh amendment, ratified in 1798, provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. *Id.* Although the language of the eleventh amendment addresses only suits brought against

Although state immunity is firmly entrenched in the scheme of federal jurisdiction, many states have enacted laws abrogating their immunity from private suits.³ Consequently, federal courts are often unable to entertain a suit against a state even though the state has consented to be sued in its own courts.⁴ Recently, in *Pennhurst State School & Hospital v. Halderman*,⁵ the Supreme Court held that when a plaintiff asserts both state and federal claims against his state arising from the same transaction, and adequate relief can be granted on the basis of state law alone, a federal court may not exercise pendent jurisdiction⁶ over the state

a state by a citizen of another state, the doctrine of sovereign immunity has been interpreted to prohibit a federal court from exercising jurisdiction over an unconsenting state in a suit brought by a citizen of that state. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 15, 19-20 (1890). Nevertheless, the doctrine of sovereign immunity contains several provisos whereby a state or its officials may be subjected to suit in federal court. See *infra* notes 40-42, 46-47 and accompanying text.

³ See THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS, *supra* note 1, at 29-43. The trend toward abrogation of sovereign immunity at the state level became apparent in the 1950's. *Id.* at 29; Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 920. It is generally believed among those who support the trend toward abrogation that sovereign immunity has outlived its own validity. THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS, *supra* note 1, at 29; see also Van Alstyne, *supra*, at 921 (noting policy considerations supporting abrogation stated by both courts and commentators). Indeed, in overruling a law that immunized the state from suit in state court, the Minnesota Supreme Court observed:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 289, 118 N.W.2d 795, 801 (1962) (quoting O. HOLMES, COLLECTED LEGAL PAPERS 187 (1920)); see also *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (sovereign immunity is an "inherently unsound" rule of law); K. DAVIS, ADMINISTRATIVE LAW TEXT 497 (3d ed. 1972) (the doctrine is one of force rather than reason); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 59 (states no longer suffer from the financial constraints that at one time justified sovereign immunity).

⁴ See, e.g., *Florida Dep't of Health & Rehabilitation Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (state statute whereby agency could "sue and be sued" held not to constitute waiver of immunity from suit in federal court); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (waiver of immunity is accomplished only by unequivocal consent to suit in federal court); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946) (consent to suit in state court does not waive eleventh amendment immunity).

⁵ 104 S.Ct. 900 (1984).

⁶ See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The *Gibbs* Court defined pendent jurisdiction as follows:

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" . . . and the relationship between that claim and the state claim permits the conclusion that the entire

claims unless the state has explicitly waived immunity to suit in federal court.⁷

In *Pennhurst*, the plaintiffs claimed that substandard conditions at a state institution for the mentally retarded constituted a violation of the residents' rights under the eighth and fourteenth amendments to the United States Constitution, as well as a violation of various federal and state statutes.⁸ Upon finding conditions at Pennhurst to be dangerously inadequate, the District Court for the Eastern District of Pennsylvania granted an injunction to close the institution, and required state officials to provide suitable community living arrangements for the displaced residents.⁹ After several appeals and remands, the Supreme Court granted a petition

action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Id. (emphasis in original) (footnotes and citations omitted).

⁷ 104 S. Ct. at 919.

⁸ *Id.* at 904. The suit was originally brought by Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. *Id.* at 903. Subsequently, the complaint was amended to include as plaintiffs all present and potential future residents of Pennhurst, the Pennsylvania Association for Retarded Citizens ("PARC") and the United States Government. *Id.* at 904. The named defendants in the suit were Pennhurst, several Pennhurst officials, the Pennsylvania Department of Public Welfare, several public welfare officials, and other various state and county officials. *Id.* The plaintiffs claimed that conditions at the institution not only violated the residents' rights under the eighth and fourteenth amendments, but also their rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1982), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1984). 104 S. Ct. at 904.

⁹ Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1326 (E.D. Pa. 1977). At trial, the district court observed that the eighth and fourteenth amendments guarantee that residents of state institutions shall be free from harm, *id.* at 1321-22, 1324, *aff'd in part rev'd in part*, 612 F.2d 84 (3d Cir. 1982), *rev'd*, 104 S. Ct. 900 (1984), and that the equal protection and due process clauses of the fourteenth amendment respectively provide for non-discriminatory habitation and habilitation in the least restrictive environment. *Id.* at 1319-20. In addition, the plaintiffs claimed that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, created a federal statutory right to freedom from discrimination, *id.* at 1323. The plaintiffs further claimed that the Pennsylvania Mental Health and Mental Retardation Act, guaranteed retarded residents in state institutions a right to minimally adequate habilitation. *Id.* at 1322. The district court appointed a Special Master "with power and duty to plan, organize, direct, supervise and monitor the implementation" of the district court's order to close the institution and to provide suitable community living arrangements for Pennhurst patients. *Id.* at 1326.

for a writ of certiorari to the Third Circuit Court of Appeals to determine whether the injunction based on the plaintiffs' state-law claim was barred by the eleventh amendment.¹⁰

Adopting the view that states enjoy a constitutionally granted immunity that is waived only by unequivocal consent to suit in federal court, a bare majority reversed,¹¹ holding that federal courts lack authority to issue injunctions against state officials based on state law.¹² Thus, the Court remanded the matter to the Third Circuit to consider whether the injunction could rest on the eighth or fourteenth amendments, or on federal statutory law.¹³

Writing for the majority, Justice Powell noted that, while an unconsenting state ordinarily may not be sued in federal court, *Ex parte Young*¹⁴ created a significant exception that permits a state official to be sued for federal constitutional violations.¹⁵ The *Young* doctrine, the majority reasoned, was intended to ensure only that state officials would comply with federal constitutional limits, and, therefore, could not be extended to relief based on state law.¹⁶ In considering the relationship between state immunity and the doctrine of pendent jurisdiction, Justice Powell noted that federal

¹⁰ 104 S. Ct. at 906. The Third Circuit Court of Appeals affirmed the lower court's decision, but modified the injunction based on the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982). *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 107 (3d Cir. 1979), *rev'd*, 104 S. Ct. 900 (1984). In modifying the injunctive order, the Third Circuit ordered that hearings be conducted to determine which patients could live in the community and which patients should remain institutionalized. *Id.* at 114 (3d Cir. 1979). In 1980, the Supreme Court granted certiorari and rendered the first of two decisions on *Pennhurst*. 451 U.S. 1 (1981). Reasoning that § 6010 of the Federal Mental Health and Mental Retardation Act, the "bill of rights" provision of the Act, contained an expression of congressional policy and not a mandate concerning the substantive rights of mentally retarded persons, *see Pennhurst*, 451 U.S. at 18, the Supreme Court reversed the lower court and remanded the case to the Third Circuit, *id.* at 32. On remand, the court was ordered to determine whether relief could be granted upon state law grounds. *Id.* at 31. The Third Circuit upheld the injunction based on the Pennsylvania Mental Health and Mental Retardation Act, *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647, 661 (3d Cir. 1982) (en banc). The Act previously had been interpreted by the Pennsylvania Supreme Court to require that the "least restrictive means of adequate habitation" be used to care for mentally retarded citizens of the state. *Id.*; *see In re Schmidt*, 494 Pa. 86, 96, 829 A.2d 631, 636 (1981). The Third Circuit rejected the defendant's claim of state immunity, as well as its claim that the court lacked jurisdiction to consider the state law claim. 673 F.2d at 659.

¹¹ 104 S. Ct. at 921.

¹² *Id.* at 919.

¹³ *Id.* at 921.

¹⁴ 209 U.S. 123 (1908).

¹⁵ 104 S. Ct. at 908-09; *see Ex parte Young*, 209 U.S. 123, 159-60 (1908).

¹⁶ 104 S. Ct. at 911.

courts deciding federal claims usually have jurisdiction over related state claims and should consolidate those claims in one action.¹⁷ The Court also observed that courts should resolve cases on the basis of state law if necessary to avoid difficult questions of constitutional law.¹⁸ However, the Court perceived the doctrine of pendent jurisdiction as subordinate to the constitutionally mandated sovereign immunity of a state.¹⁹ While the majority recognized that its decision in *Pennhurst* might frustrate the goal of judicial economy and lead to unnecessary constitutional interpretation, it concluded that such considerations of policy must yield to constitutional limits on federal power.²⁰

Justice Brennan dissented on the ground that common-law state immunity was superseded by ratification of the Constitution by the states.²¹ Justice Stevens dissented separately, arguing that the eleventh amendment does not protect state officials who violate state law.²² Justice Stevens, asserting that the *Young* doctrine does not apply only to federal constitutional violations, contended that *Young* also renders any state official acting in violation of state or federal law amenable to federal jurisdiction.²³ Furthermore, Justice Stevens perceived that the majority's decision was an undue limitation on the principle of judicial restraint.²⁴

The *Pennhurst* majority's recognition of a constitutional immunity that overrides the doctrines of pendent jurisdiction and judicial restraint allows states to decide whether and where to be sued. By deferring to a state's interest in determining the extent of its own liability, however, the *Pennhurst* Court may have unnecessarily proscribed the power of federal courts to hear state-law

¹⁷ *Id.* at 917.

¹⁸ *Id.*

¹⁹ *Id.* at 919-20. The Court held that although the State of Pennsylvania had waived its immunity against suits in state court brought by mentally retarded citizens of the state, *id.* at 923-24, the waiver was not sufficient to constitute a waiver of state sovereign immunity from suit in federal court, *id.* at 907 n.9. Thus, a state may decide to be sued in state court without exposing itself to federal jurisdiction. *Id.* at 907. The *Pennhurst* Court held that "this principle applies as well to state-law claims brought into Federal court under pendent jurisdiction." *Id.*

²⁰ *Id.* at 919-20.

²¹ *Id.* at 921 (Brennan, J., dissenting) (citing *Yeomans v. Kentucky*, 423 U.S. 983, 984 (1975) (Brennan, J., dissenting)).

²² *Id.* at 933 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined in Justice Stevens' dissent.

²³ *Id.* (Stevens, J., dissenting).

²⁴ *Id.* at 942 (Stevens, J., dissenting).

claims against state officials. This Comment will conclude that, from an historical perspective, *Pennhurst* grants unprecedented protection to state sovereign immunity interests. Furthermore, this Comment will note the potential effect of *Pennhurst* on the scope of pendent jurisdiction and on the doctrine of judicial restraint, and will submit that if the Supreme Court had weighed state immunity interests in light of the consent of the state to be sued in state court, the Court could have promoted comity without sacrificing federal power.

THE DEVELOPMENT OF STATE IMMUNITY

Prior to the ratification of the Constitution, the question of state immunity from suit in federal court was debated fiercely in state constitutional conventions.²⁵ The controversy centered on the meaning of the sixth clause in Article III, section two, of the Constitution, which grants federal courts jurisdiction over all cases between a "State and Citizens of another State."²⁶ While some delegates viewed this clause as an abrogation of sovereign immunity that would subject unconsenting states to federal jurisdiction,²⁷

²⁵ See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (1923) ("The right of the Federal Judiciary to summon a state as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution"); Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 838 (1981) ("no unanimity among the Framers that immunity would exist"); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 529-30 (1981) (debate concerning state immunity was unresolved when the Constitution was adopted).

²⁶ U.S. CONST. art. III, § 2. Article III, § 2 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty, and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States; *between a State and Citizens of another State*;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. (emphasis added).

²⁷ See Field, *supra* note 25, at 531; Gibbons, *supra* note 1, at 1903-14; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 212-14 (1968). In light of statements made in state conventions during the ratification of the Constitution, many delegates perceived that article III, § 2, abrogated sovereign immunity and subjected the states to suit in federal court. Field, *supra* note 25, at 531, Mathis, *supra*, at 212-14. Indeed, a majority of delegates in financially troubled states opposed the Constitution because they believed that states would be accountable for their debts in federal courts. Gibbons, *supra* note 1, at 1903-14; see e.g., 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE*

others contended that Article III would not affect a state's control over its immunity from suit in federal court.²⁸ This controversy remained unresolved when the Constitution was ratified.²⁹

The ratification of the eleventh amendment in 1798 partially resolved the ambiguity surrounding the status of state immunity in the scheme of federal jurisdiction.³⁰ Insofar as the amendment barred suits against states brought by citizens of another state, it dispelled the view that Article III contained an abrogation of sovereign immunity.³¹ The amendment did nothing, however, to clarify the federal stance toward jurisdiction over a suit against a state by a citizen of the same state.³²

CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (1937) (remarks of Patrick Henry before the Virginia State Convention). Likewise, proponents of the Constitution shared the view that sovereign immunity was abrogated by article III, § 2. *See, e.g.*, 2 J. ELLIOT, *supra*, at 207, 491 (remarks of James Wilson in favor of ratification of the Constitution); 3 J. ELLIOT, *supra*, at 207 (remarks of Edmund Randolph).

²⁸ *See* Field, *supra* note 25, at 527-36; Gibbons, *supra* note 1, at 1905-12; Mathis, *supra* note 27, at 214. Alexander Hamilton, James Madison, and John Marshall sought to gain support for the Constitution in the state conventions by reassuring those who feared that article III, § 2, abrogated state immunity from suit in federal courts. *See* Gibbons, *supra* note 1, at 1905-06; *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). Indeed, Hamilton asserted that in order to be amenable to suit in federal court a state must give its consent. *See* *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). Likewise, Madison and Marshall reassured state delegates by interpreting the clause "between a state and Citizens of another State" to provide a neutral federal forum where states may sue as plaintiff and recover debts owed by citizens of other states. *See id.* (quoting U.S. CONST. art. II § 2).

²⁹ Field, *supra* note 25, at 529-30; Currie, *supra* note 25, at 838.

³⁰ U.S. CONST. amend XI; *see supra* note 2. The eleventh amendment was adopted as a direct response to the decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), wherein the Supreme Court held that under article III, § 2, Congress could subject the states to suits brought in federal court by citizens of other states. *See Pennhurst*, 104 S. Ct. at 906; *Nevada v. Hall*, 440 U.S. 410, 420 (1979); C. WARREN, *supra* note 25, at 101. In *Chisholm*, the Supreme Court interpreted the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, as providing that the Court had original jurisdiction to grant a writ of assumpsit against the State of Georgia brought by a citizen of the State of South Carolina. *Chisholm*, 2 U.S. (2 Dall.) at 477. The public reaction to the Court's decision is commonly characterized as being one of "profound shock." *Pennhurst*, 104 S. Ct. at 906; C. WARREN, *supra* note 25, at 96-100. The eleventh amendment was ratified within 5 years of *Chisholm* to overrule that decision and to grant states immunity from suit in federal court by citizens of another state. U.S. CONST. amend. XI.

³¹ *See, e.g.*, *Monaco v. Mississippi*, 292 U.S. 313, 325-26 (1934); *Hans v. Louisiana*, 134 U.S. 1, 12-15 (1890); Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 293-94 (1980). In responding to the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the draftsmen of the eleventh amendment incorporated the view of Madison, Marshall, and Hamilton that state sovereign immunity had not been abrogated by the Constitution. *Monaco*, 292 U.S. at 325-26; *Hans*, 134 U.S. at 12-13.

³² There is considerable debate among Supreme Court Justices concerning federal jurisdiction over suits against a state brought by citizens of the same state because the eleventh

Not until ninety-four years later, in *Hans v. Louisiana*,³³ did the Supreme Court hold that state immunity barred suits against an unconsenting state by citizens of the same state.³⁴ Although Justice Powell interpreted *Hans* as holding that sovereign immunity is constitutionally mandated,³⁵ it is submitted that the *Hans* Court held only that when a state court would not entertain a private suit against a state, a federal court similarly lacked jurisdiction.³⁶ Moreover, the *Hans* Court was construing a federal statute that granted federal courts jurisdiction over state claims concurrent with that of the states.³⁷ Thus, *Hans* left open the question of

amendment expressly prohibits only suits by citizens of another state. Compare *Pennhurst*, 104 S. Ct. at 907 (sovereign immunity is a constitutional limitation on the power of the courts) with *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting) (sovereign immunity affords a state only non-constitutional immunity from a suit brought by a same-state citizen). Most commentators addressing the subject have agreed that the Constitution embodies a common-law doctrine of immunity. See *Pennhurst*, 104 S.Ct. at 930 n.18 (Stevens, J., dissenting) (articles cited therein). See generally M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 139-46 (1980) (discussing common-law sovereign immunity approaches taken by Justices Brennan and Marshall).

³³ 134 U.S. 1 (1890).

³⁴ *Id.* at 10. In *Hans*, the State of Louisiana disavowed all its contractual obligations concerning state-issued bonds by adopting a new state constitution that, in superseding the old constitution, stated that the money from the bonds would be used to "defray the expenses of state government." *Id.* at 2. Thus, the plaintiff, a bondholder and citizen of the state of Louisiana, sued in federal court alleging that the state had violated the Contract Clause of the Constitution, which prohibits a state from passing any law to impair its contractual obligations. *Id.* at 3; see U.S. CONST. art. I, § 10, cl. 1.

³⁵ See *supra* text accompanying note 19.

³⁶ See *Hans*, 134 U.S. at 14-15. Relying upon the presumption that at the time the Constitution was ratified it was not the intent of the Framers to adopt "new and unheard of proceedings or remedies," the *Hans* Court perceived that sovereign immunity as it existed at common law had not been abrogated by article III, § 2, of the Constitution. See *id.* at 13-16 (adopting the view that the Framers, in ratifying the Constitution, meant to preserve the principle that a state cannot be sued without its consent). Moreover, the *Hans* Court cited with approval the dissenting opinion of Justice Iredell in *Chisholm*. *Id.* at 16, 18-19 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (Iredell, J., dissenting)). Justice Iredell perceived that it was unheard of at common law for a sovereign to be sued without its consent, and argued that it was not the intent of the Framers in ratifying the Constitution to abrogate sovereign immunity. *Chisholm*, 2 U.S. (2 Dall.) at 449 (Iredell, J., dissenting). The Justice concluded that the Court was without jurisdiction because the state of Georgia had not given its consent to suit, even in its own state courts. *Id.* at 434 (Iredell, J., dissenting). In contrast to the *Pennhurst* majority's view that the Constitution contains an affirmative grant of sovereign immunity, the *Hans* Court and Justice Iredell in *Chisholm* argued that the Constitution is neutral concerning state immunity from suit and, thus, preserved sovereign immunity as it existed at common law. See Field, *supra* note 25 at 532.

³⁷ *Hans*, 134 U.S. at 18. In *Hans*, the Supreme Court construed a statute that conferred original federal jurisdiction over "suits arising under the Constitution or laws of the United States . . . [c]oncurrent with the courts of the several States." *Id.* Because Louisiana had

whether a state's consent to suit in state court would be sufficient to waive immunity at the federal level.³⁸ It is clear, however, that the *Hans* Court did not interpret article III or the eleventh amendment as mandating that a state unequivocally consent to suit in federal court.³⁹ By affirmatively granting a constitutional immunity that, absent consent by the state, bars suits against a state in federal court by citizens of that state, *Pennhurst* has exceeded both the *Hans* Court and the intent of the Framers, and, thus, it is submitted, constitutes an unprecedented deferral to state sovereign immunity.

FEDERAL JURISDICTION OVER A STATE

Federal courts exercise jurisdiction over states pursuant to several exceptions to the doctrine of sovereign immunity.⁴⁰ When a state engages in interstate commercial activity that is regulated by

not consented to suit in its own courts, the Court held that there was no concurrent jurisdiction available to the federal courts to hear the claim. *Id.*

³⁸ Although the *Hans* Court held that a state may not be sued by its own citizens, the decision is criticized for its lack of clarity. See Engdahl, *supra* note 3, at 60-61 (questioning *Hans* decision as one that lacks precedent and that is internally inconsistent). Indeed, the decision is subject to contrasting interpretations. Compare *Pennhurst*, 104 S. Ct. at 906-07 (interpreting *Hans* to require constitutional grant of immunity to the states) with *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting) (contending that *Hans* Court mandated that common-law immunity was reserved for states by Constitution).

³⁹ Contrary to Justice Powell's opinion, it is submitted that the *Hans* case is no bar to a suit against a state by its own citizen in federal court when the state has already consented to suit in its own court. Since the state of Louisiana had not consented to suit in its own courts, see *supra* note 34, *Hans* is factually distinguishable from *Pennhurst*. Compare *Hans*, 134 U.S. at 2 (Louisiana had not waived sovereign immunity in Louisiana courts) with *Pennhurst*, 104 S. Ct. at 909 (Pennsylvania has waived immunity for suits in Pennsylvania courts). Although the *Hans* Court held that a federal court lacks jurisdiction unless there is concurrent jurisdiction in the state court, see *supra* note 37, it is submitted that *Hans* does not serve as a springboard for Justice Powell's view that the Constitution grants immunity that can only be waived by unequivocal consent to suit in federal court.

⁴⁰ See Mathis, *supra* note 27, at 210. The power of the federal courts to exercise jurisdiction over suits involving state defendants has been reaffirmed in several leading Supreme Court decisions. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Congress is empowered to extend federal jurisdiction to private suits involving state defendants pursuant to enforcement provisions of § 5 of the fourteenth amendment); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (federal courts may provide remedial injunctive relief against state officials who violate federal law); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 287 (1973) (Congress may abrogate state immunity when it acts pursuant to enumerated powers); see also *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965) (states are not immune from suits brought by federal government); *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923) (federal courts have jurisdiction over controversies between two states).

Congress, the state may be deemed to have waived its immunity and subjected itself to federal jurisdiction.⁴¹ In addition, under the "piercing doctrine," a state is amenable to suit in federal court when Congress legislates to abrogate state immunity pursuant to the enforcement clause of the fourteenth amendment.⁴² In both instances, a violation of state law often arises from the same transaction that gave rise to the federal claim.⁴³ Although the doctrine of pendent jurisdiction normally would allow a federal court to entertain related federal and state-law claims in a single action, *Pennhurst* prohibits a federal court from hearing state-law claims against a state when adequate relief can be granted solely on the basis of state law.⁴⁴

A further exception to state immunity was recognized by the Court in *Ex parte Young*.⁴⁵ To ensure that state action does not transgress limits prescribed by the federal Constitution, *Young* held that a state official who acts in violation of the Constitution is stripped of his state authority and subject to federal jurisdiction.⁴⁶ Balancing the state interest in protecting its treasury with the federal interest in enforcing constitutional rights, the Supreme Court

⁴¹ See, e.g., *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 286-87 (1973); *Parden v. Terminal R.R.*, 377 U.S. 184, 191-93 (1964). In *Parden*, the Court reasoned that "by empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192. Subsequently, the Court indicated that states waive immunity only when Congress "by the most express language" or overwhelming implication leaves no room for any other reasonable construction. *Edelman v. Jordan*, 415 U.S. 651, 673 (1973).

⁴² See, e.g., *Quern v. Jordan*, 440 U.S. 332, 342 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-57 (1976); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 288 (1913).

⁴³ See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 545-46 (1974); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 177 (1909); see also *infra* note 52.

⁴⁴ See 104 S. Ct. at 911.

⁴⁵ 209 U.S. 123 (1908).

⁴⁶ *Id.* at 159-60. In *Young*, plaintiffs sought injunctive relief from the enforcement of statutorily prescribed railroad rates by the Attorney General of Minnesota. *Id.* at 130. Because it was alleged that the railroad rates were unreasonably high and, therefore, constituted a violation of due process, *id.*, the Court upheld the injunction against the Attorney General, *id.* at 159. Recognizing the need to ensure that state officials conform to federal constitutional standards, the Court adopted the fiction that a state official is stripped of his state authority when he allegedly acts in violation of federal law and, consequently, is unprotected by the shield of state immunity. *Id.*; see C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 48 (4th ed. 1983). In determining whether a plaintiff may sue under the *Ex Parte Young* doctrine, a federal court determines if the suit is against the state official in his individual capacity. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). The doctrine of sovereign immunity bars a federal court from entertaining the case if the state is the "substantial party of interest." *Id.*; see *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

subsequently limited the *Young* doctrine to suits seeking injunctive relief.⁴⁷ As in the cases involving implied consent, a federal court applying the *Young* doctrine ordinarily may exercise pendent jurisdiction over state claims.⁴⁸ Pursuant to *Pennhurst*, however, a federal court invoking *Ex parte Young* jurisdiction will be barred from hearing the pendent state-law claim.⁴⁹

THE PURPOSE OF PENDENT JURISDICTION

The *Pennhurst* majority, by prohibiting the exercise of pendent jurisdiction when suit is brought against a state in federal court, has affected legitimate federal interests in judicial restraint and fairness to litigants.⁵⁰ The requirement that a federal court examine each claim separately to see if that claim is barred by state immunity, it is submitted, cripples the long-standing principle that federal jurisdiction extends to "cases," and not merely questions, arising under the Constitution.⁵¹ Indeed, the doctrine of pendent

⁴⁷ See *Edelman v. Jordan*, 415 U.S. 651, 656 (1976). In *Edelman*, a lower federal court found that Illinois state officials violated federal regulations under the Federal Aid to the Aged, Blind and Disabled Program, and ordered injunctive relief and retroactive payment by state officials of benefits wrongfully withheld. *Id.* at 658. The Supreme Court upheld the injunction, but reversed the order to make retroactive payments. *Id.* The Court observed that "a suit by private parties seeking to impose liability which must be paid from public funds in the state treasury is barred by the eleventh amendment." *Id.* at 656. Although *Edelman* indicates that the eleventh amendment bars all raids upon state treasuries, Congress may, "in determining what is 'appropriate legislation' for purposes of the fourteenth amendment, provide for private suits for damages against states or state officials." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see *supra* note 42 and accompanying text. Moreover, in enforcing a prospective injunction, a federal court may provide ancillary relief to plaintiffs, such as attorney's fees, and may impose fines and other penalties against the state. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 693-95 (1978); *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977); *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974).

⁴⁸ See *infra* note 52 and accompanying text.

⁴⁹ 104 S. Ct. at 919.

⁵⁰ See *id.*

⁵¹ See U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (1982); see also *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (contract claims based on state law should not be aired in federal court); *Pacific R.R. Removal Cases*, 115 U.S. 1, 14 (1885) (corporations owing their existence to acts of Congress permitted to remove cases to federal court); cf. *Bank of the United States v. Planter's Bank*, 22 U.S. (9 Wheat.) 904, 909-10 (1824). It is well recognized that Congress may extend federal jurisdiction to cases involving predominantly questions of state law as long as "there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question." *Textile Workers*, 353 U.S. at 471 (Frankfurter, J., dissenting); see also *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (federal courts may properly exercise jurisdiction when federal law "creates the cause of action"). But see *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S.

jurisdiction springs directly from this article III-mandated principle.⁵² In federal question cases involving implied consent by the state, enforcement clause legislation, or *Ex parte Young* jurisdiction, the Court has recognized that the power to decide questions of state law is necessary if federal courts are to function effectively as forums of original jurisdiction.⁵³ Under *Pennhurst*, however, since a federal court is precluded from hearing state-law claims, plaintiffs with integral state and federal claims against a state will be forced to choose among three undesirable courses of action: bifurcating the claims, consolidating both claims in state court, or

667, 672 (1950) (federal question must appear on face of well pleaded complaint); *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914); (complaint must present federal question "unaided by anything alleged in anticipation" of defenses that may be interposed).

⁵² See, e.g., *Aldinger v. Howard*, 427 U.S. 1, 9 (1976); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Hurn v. Oursler*, 289 U.S. 238, 243, 245-46 (1933). *Gibbs* involved a federal claim under the Taft-Hartley Act and a related state claim of unlawful interference with contractual relations brought by union workers against their employer. 383 U.S. at 720. The district court awarded damages based upon the state-law claim. *Id.* at 720-21. Writing for the Court, Justice Brennan reasoned that while pendent jurisdiction was a well-established principle of the federal courts, the Court had been "unnecessarily grudging" in allowing its use. *Id.* at 724 (questioning *Hurn v. Oursler*, 289 U.S. 238 (1933)). Furthermore, Justice Brennan devised a three-part test to determine whether jurisdiction may be exercised over a state claim: First, there must be a claim "arising under" the Constitution or laws of the United States; second, the federal claim must be substantial enough to confer jurisdiction; and, third, the federal and state claims must derive from a "common nucleus of operative fact." *Id.* at 725. Justice Brennan noted that pendent jurisdiction should be extended to state claims when a federal court perceives that to do so will facilitate the goals of fairness to litigants and judicial economy. *Id.* at 726. See generally Note, *Federal Jurisdiction*, 44 TEX. L. REV. 1631, 1631-35 (1966). Lastly, the *Gibbs* test is significant because it is the modern standard applied in federal courts to decide whether to assert or withhold jurisdiction over a pendent state claim. See Teruya, *Ancillary and Pendent Jurisdiction of Federal Courts*, 31 FED. B. NEWS & J. 254, 256 (1984).

⁵³ See, e.g., *Hurn v. Oursler*, 289 U.S. 238, 245. (1933); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909); *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 823 (1824). While the Supreme Court will limit the scope of review to federal questions when exercising appellate jurisdiction over state court decisions, C. WRIGHT, *supra* note 46, at 536-37, it is widely recognized that a federal court of original jurisdiction must have power to decide questions of state law involved in a case in order to function effectively, see, e.g., *Osborne*, 22 U.S. (9 Wheat.) at 821-22. Moreover, commentators on federal jurisdiction enumerate several reasons why a federal rather than a state court should hear federal cases, such as federal judges have expertise in deciding questions of federal law, federal jurisdiction promotes uniform interpretation of the law, and state courts may be hostile to federally created rights. See AMERICAN LAW INSTITUTE, STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 163-68 (1969); D. CURRIE, *FEDERAL COURTS—CASES AND MATERIALS* 160 (1982). Because of the importance of federal determination of the facts at trial, it is frequently noted that review of a state court decision by the Supreme Court is an inadequate substitute for original jurisdiction in federal district court. See, e.g., *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 416-17 (1964); *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 822-23 (1824); AMERICAN LAW INSTITUTE, *supra*, at 168.

foregoing the state claim and bringing only the federal claim in federal court.⁵⁴ Furthermore, *Pennhurst* pressures federal courts to resolve unnecessary and difficult questions of constitutional law, thereby draining the power and the legitimacy of the federal system.⁵⁵

While the *Pennhurst* Court engaged in weighing state and federal interests before choosing not to exercise pendent jurisdiction over the related state claims, it is suggested that the Court afforded less credence to what heretofore have been recognized as strong federal interests.⁵⁶ It is further suggested that a federal court, when presented with jurisdictional facts similar to those in *Pennhurst*, should measure the interest in judicial economy and fairness to the litigants promoted by consolidating all claims in a single case, as well as the interest in deciding cases on the basis of state law to avoid unnecessary constitutional questions. These in-

⁵⁴ See 104 S. Ct. at 919-20. Usually courts attempt to resolve as many claims as is practical in a single action. D. SIEGEL, *NEW YORK PRACTICE* 115 (Supp. 1982). Thus, plaintiffs suing in state court are permitted to state in a single complaint as many claims as they have against an opposing party. See, e.g., MASS. R. CIV. P. 18; N.Y. CIV. PRAC. LAW § 601 (McKinney 1984); TEX. R. CIV. P. 51(a).

⁵⁵ *Id.* at 939-42 (Stevens, J., dissenting). Since the *Pennhurst* majority held that a federal court is prohibited from exercising jurisdiction over a pendent state claim against a state official, the decision is contrary to the principle that a federal court should avoid constitutional questions where a case may be resolved on the basis of state or local law. *Id.* at 939-40 (Stevens, J., dissenting). This principle of judicial restraint is derived from the belief that unnecessary constitutional issues should be avoided whenever possible. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 546 (1974); *Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946); *Waggoner Estate v. Wichita County*, 273 U.S. 113, 116-19 (1927). Moreover, the majority decision overruled numerous cases where a suit against state officials involved both federal and pendent state claims and the district court, following the principle of judicial restraint, fashioned relief on the basis of state law. See, e.g., *Lee v. Bickell*, 292 U.S. 415, 425 (1934); *Glenn v. Field Packing Co.*, 290 U.S. 177, 178 (1933); *Davis v. Wallace*, 257 U.S. 478, 482-85 (1922); *Louisville & Nashville R.R. v. Greene*, 244 U.S. 522, 527 (1917); *Greene v. Louisville & Interurban R.R.*, 244 U.S. 499, 508, 512-14 (1917); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909). The *Pennhurst* majority contended that because in each of these cases the jurisdictional issue was not addressed by the Court, the application of the eleventh amendment to pendent state claims against state officials was a question of first impression. 104 S. Ct. at 918. But see *Greene v. Louisville & Interurban R.R.*, 244 U.S. 499, 508 (1917) (noting that jurisdiction over state officials extends to state law claims); *Rolston v. Missouri Fund Comm'rs*, 120 U.S. 390, 411 (1887) (explicitly rejecting argument that eleventh amendment bars federal court from asserting jurisdiction over state official who violates state law). Thus, while the *Pennhurst* majority perceived that policy considerations such as those underlying the doctrine of judicial restraint may not override constitutional limits on the power of federal courts, 104 S. Ct. at 920, the Court overruled prior decisions that clearly indicated that the eleventh amendment does not bar federal courts from adjudicating pendent state claims against state officials.

⁵⁶ See *supra* note 53 and accompanying text.

terests should then be weighed against the state interest underlying sovereign immunity.⁵⁷ In *Pennhurst*, the interest of the state in determining the scope of its own liability already was satisfied when Pennsylvania chose to waive its immunity and vest a legally enforceable right in a certain class of citizens.⁵⁸ Thus, if a court were to engage in balancing federal and state interests, the only state interest remaining would be the preference of the state to adjudicate claims against itself in its own forum.⁵⁹ It is suggested, however, that this is not a legitimate state interest, since there should be no difference in outcome whether the pendent state claim is heard at the federal or state level.⁶⁰ The only conceivable reason the state would have for refusing to consent to suit in federal court would be to preserve state bias in the adjudication of such suits and to prevent federal courts from supplying a neutral forum.⁶¹ Clearly, this is not a legitimate reason that should be

⁵⁷ See *supra* notes 54-55 and accompanying text.

⁵⁸ 104 S. Ct. at 905 (citing *Pennhurst State School & Hosp. v. Halderman*, 673 F.2d 647 (3d Cir. 1982); *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981)). Noting that the Pennsylvania Supreme Court held that the state was required by statute to adopt the "least restrictive means" in caring for its mentally retarded citizens, the Third Circuit Court of Appeals concluded that relief for the *Pennhurst* plaintiffs should be predicated on state law grounds. 673 F.2d at 654-56; see *supra* note 10.

⁵⁹ The Court consistently has upheld a state's right to consent to suit in state court while reserving immunity from suit in federal court. See, e.g., *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981); *Nevada v. Hall*, 440 U.S. 410, 418-19 (1978); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); see also Comment, *States—Waiver of Immunity to Suit with Special Reference to Suits in Federal Courts*, 45 MICH. L. REV. 348, 355-58 (1947) (it is unclear whether a blanket suit brought by a state permits federal jurisdiction). Prior to *Pennhurst*, however, no cases have held that the state's reservation of immunity from suit in federal court attaches to pendent state claims that arise in federal cases. In fact, it is submitted that the weight of authority indicates that federal courts may exercise jurisdiction over such claims. See *supra* note 55.

⁶⁰ See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1965); C. WRIGHT, *supra* note 46, at 109 (1982). Federal courts deciding pendent state claims are bound to apply the substantive law of the state. C. WRIGHT, *supra*, at 109. Thus, whether a federal or state court entertained a state claim against a state official, there presumably would be no difference in outcome. Moreover, by prohibiting federal courts from exercising jurisdiction over state claims, *Pennhurst* "prevents federal courts from implementing state policies through equitable enforcement of state law." *Pennhurst*, 104 S. Ct. at 942 (Stevens, J., dissenting). In addition to impeding the interest of comity, *Pennhurst*, by requiring a federal court to resolve cases on federal grounds, will necessarily produce more decisions concerning the liability of state officials that may not be reexamined by the state. *Id.* (Stevens, J., dissenting).

⁶¹ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474-75 (1957) (Frankfurter, J., dissenting) (theory of "protective jurisdiction" which extends federal jurisdiction to suit involving interstate commerce is predicated upon belief in inadequacy of state courts to decide questions of state law in an impartial manner); *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822-23 (fear of prejudice in state courts prompted Congress

weighed by a court.⁶²

Conversely, legitimate federal interests are threatened by the *Pennhurst* Court's bar on pendent jurisdiction in suits against a state.⁶³ It is suggested that a federal court should consider the need to consolidate related federal and state claims and avoid resolving unnecessary constitutional questions, particularly when, as in *Pennhurst*, there are no jurisdictional or precedential considerations compelling the court to refrain from exercising pendent jurisdiction over the related state claim. Therefore, it is submitted that due to the state's consent to suit in state court,⁶⁴ and the federal interests that would be advanced by the exercise of jurisdiction,⁶⁵ the *Pennhurst* majority should have held that article III jurisdiction extends to the state-law claim.

CONCLUSION

In *Pennhurst*, the Supreme Court held that, despite the consent of a state to be sued in state court, the constitutional limitations imposed by Article III and the eleventh amendment bar the extension of pendent jurisdiction to state officials' violations of state law.⁶⁶ Not only is the Court's decision unprecedented, but it impedes established federal policies of judicial economy and judicial restraint. Moreover, since the state had already consented to suit, the Court's decision does not significantly serve the state interest in determining the scope of its liability. It is suggested, therefore, that the Court could have more sensitively weighed the

to authorize national bank to sue and be sued in federal court); C. WRIGHT, *supra* note 46, at 78 (3d ed. 1976) (discussing state court bias as underlying justification for theory of protective jurisdiction of federal courts); cf. AMERICAN LAW INSTITUTE, *supra* note 53, at 488 (recognizing that prejudice against certain federally-created rights will sometimes affect state court decisions).

⁶² It is commonly recognized that article III authorizes the exercise of federal jurisdiction to provide a neutral forum to protect litigants' rights from state court prejudices. Note, *Federal Jurisdiction—Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 MICH. L. REV. 710, 715 n.34 (1971); see Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 185 (1953). Thus, federal jurisdiction conferred on the basis of diversity of citizenship by article III, § 2, protects out-of-state litigants from state court prejudices. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 82-83 (1923).

⁶³ See *supra* notes 54-55 and accompanying text.

⁶⁴ See *supra* text accompanying note 58.

⁶⁵ See *supra* notes 54-55 and accompanying text.

⁶⁶ 104 S. Ct. at 919.

federal and state interests and decided to extend the doctrine of pendent jurisdiction to consolidate related federal and state claims against a state in one action.⁶⁷

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⁶⁷ See *supra* notes 54-55 and accompanying text. The *Pennhurst* majority reasoned that constitutionally granted sovereign immunity precludes the Court from considering the federal interest in: (1) providing a federal forum in which to vindicate federally created rights, and (2) avoiding unfairness to litigants. 104 S. Ct. at 919-20. It is submitted that the doctrine of sovereign immunity," of which the [eleventh] amendment is but an exemplification," *In re New York* 256 U.S. 490, 497 (1921), is itself predicated upon public policy. See *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949); K. DAVIS, *supra* note 3, at 497-99. Moreover, the federal interests in vindicating federal rights and facilitating litigation underlie the doctrine of pendent jurisdiction, which, itself, is a constitutionally mandated principle. See *supra* note 52. Thus, it is submitted that contrary to the view of the *Pennhurst* majority, the federal interests override the state interest in sovereign immunity from suit in federal court.